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UNCLAS SECTION 1 OF 2 USNATO 0124

E.O. 11652: N/A

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SUBJ: NICS/TARE PROCUREMENT

REFS: A. STATE 6430; B. USNATO 7057; C. USNATO 0014

1. AS REQUESTED REF A, MISSION FORWARDS SUMMARY OF NICSMA
RESPONSES TO MISSION QUESTIONS OUTLINED REF B:

A. NICSMA HAS CLARIFIED THEIR POSITION AS FOLLOWS:

QUOTE IN THE EVENT THAT A NON-APPROVED REPLACEMENT PART IS USED
(BY THE PURCHASER), THE CONTRACTOR WILL BE RELIEVED OF HIS
OBLIGATIONS (FOR THE DEFECT CONCERNED) UNDER THE WARRANTY PRO-
VISIONS OF THIS CONTRACT UNQUOTE.

B. TO ALLEVIATE CONTRACTOR FEARS OF BEING OBLIGATED
TO PROCURE LONG LEAD TIME COMPONENTS FOR PHASE II BEFORE RECEIVING
FINAL AUTHORITY FROM NICSMA, NICSMA INTENDS TO APPROACH THE P&P
COMMITTEE WITH A REQUEST FOR APPROVAL OF THE PRINCIPLE OF
COMMITTING NATO FUNDS FOR PHASE II LONG LEAD TIME ITEMS DURING
PHASE I OF THE CONTRACT.

C. CONTRACTORS WERE CONCERNED OVER GLOBAL NICSMA RIGHTS
TO ACCESS TO CORPORATE BOOKS. NICSMA REPLIES, QUOTE IT IS INTENDED
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TO HAVE AUDIT SUPPORT BY NATIONAL AUDIT SERVICES. NICSMA RETAINS
ITS OWN RIGHT OF ACCESS TO BOOKS AND RECORDS. THIS RIGHT WILL BE
EXERCISED IN COMPLIANCE WITH THE NORMAL NATIONAL PRACTICES AS
FOLLOWED BY NATIONAL DEFENSE CONTRACT AUDIT AGENCIES UNQUOTE.

QUOTE WHENEVER POSSIBLE, NICSMA WILL ENLIST THE HELP OF THE CONTRACTOR'S NATIONAL GOVERNMENT TO DO ITS CHECKING UNQUOTE.

D. TO THE MISSION SUGGESTION THAT LIQUIDATED DAMAGES CLAUSES BE WAIVED AS IN PREVIOUS NATO PROCUREMENTS, NICSMA REPLIES, QUOTE AS IN THE CASE OF THE US PROCUREMENT REGULATIONS, ONE OF THE MAIN REASONS FOR INCLUDING LIQUIDATED DAMAGES IN CONTRACTS IS TO AVOID PROTRACTED LITIGATION WITH THE CONCOMITANT DIFFICULTY AND EXPENSES OF PROVING ACTUAL DAMAGES. THE LIQUIDATED DAMAGES CLAUSE THEN MERELY AIMS AT AVOIDING ADDITIONAL EXPENSES INSTEAD OF CREATING THEM THEMSELVES. NICSMA CANNOT FOLLOW THE US DELEGATION'S ARGUMENTATION THAT AS CONSEQUENCE OF THE CLAUSE, THE BIDDERS WOULD HAVE TO ADD A MAJOR PORTION OF THAT COST IN THE BID, SINCE THEY WOULD ONLY COME UP IN CASE OF A CONTRACTOR'S DEFAULT AND /OR A MISMANAGEMENT ATTRIBUTABLE TO HIM. THE RATHER RIGID COMPETITION AMONG BIDDERS OF DIFFERENT NATIONS WILL CERTAINLY GUARANTEE MOST REASONABLE PRICES OF SUCH BIDDERS WHO HAVE A GOOD CONFIDENCE IN THEIR OWN CAPABILITIES TO AVOID DELAYS CAUSED BY THEIR OWN DEFAULTS AND DELIQUENCIES ATTRIBUTABLE TO THEMSELVES UNQUOTE.

E. NICSMA HAS REVISED ITS DEFAULT CLAUSE TO ELIMINATE THE NOTION OF UNLIMITED CONSEQUENTIAL DAMAGES AS FOLLOWS: QUOTE CONTRACTOR'S TOTAL LIABILITY FOR CONSEQUENTIAL DAMAGES WHICH ARE IN ADDITION TO THE RIGHTS AND REMEDIES SET FORTH IN THE CONTRACT CLAUSES SHALL NOT EXCEED AN AMOUNT EQUIVALENT TO THE TOTAL CONTRACT PRICE UNQUOTE.

F. TO A CONTRACTOR COMPLAINT THAT NO MILESTONE PAYMENTS WERE FORESEEN, NICSMA REPLIES, QUOTE WE HAVE NOW INTRODUCED A FURTHER MILESTONE PAYMENT EQUAL TO 30 PCT OF THE EQUIPMENT PRICE AT THE TIME OF SATISFACTORY COMPLETION OF FACTORY ACCEPTANCE TESTS. FURTHERMORE, NICSMA AGREES TO MAKE THE 30 PCT ADVANCE PAYMENT FOR PHASE II WITHIN 60 DAYS OF AUTHORIZATION TO PROCEED UNQUOTE.

G. TO CLARIFY PRESENTATIONS OF BID AND ALTERNATES ON WHICH PRICE EVALUATION WOULD BE APPLIED FOR PURPOSE OF CONTRACT UNCLASSIFIED

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AWARD, NICSMA STATES THAT, QUOTE THE EVALUATION WILL BE BASED ON THE TOTAL OF 19 TARES PLUS ALTERNATIVE 2, 3, AND 4 UNQUOTE. MISSION COMMENT: IN VIEW OF NICS FUNDING PROBLEM, WE BELIEVE THAT TARE PROCUREMENT MAY WELL BE STOPPED AFTER FIRST 12 UNITS. IF CONTRACTORS RECOGNIZE THAT POSSIBILITY, SOME OF THEM COULD BE MOTIVATED TO BID LOW ON 19 TARES AND HIGH ON THE FIRST 12 UNITS. WE INTEND TO RAISE THIS PROBLEM AT P&P COMMITTEE MEETING ON 16 JANUARY. END COMMENT.

H. NICSMA HAS CONFIRMED TOTAL CONTRACTOR RESPONSIBILITY FOR CONDITION OF THE INSTALLATION SITES AS FOLLOWS: QUOTE IT IS GENERAL DOCTRINE THAT CONTRACTOR'S FAILURE TO MAKE A COMPLETE EXAMINATION OF ALL THE AREAS COVERED BY THE CONTRACT

DESCRIPTIONS AND DRAWINGS PRECLUDED HIM FROM TAKING ADVANTAGE OF A MATERIAL ERROR WHICH SUCH EXAMINATION WOULD HAVE REVEALED. THE MERE FACT THAT A SITE INFORMATION IS SUBSTANTIALLY IN ERROR IS NOT ENOUGH IN ITSELF TO JUSTIFY RELIEF TO THE CONTRACTOR IF THE ERROR IN THE DESCRIPTION COULD HAVE BEEN DETECTED BY AN ON-SITE INSPECTION UNQUOTE.

I. TO CONTRACTOR COMPLAINT CONCERNING LACK OF CRITERIA FOR QUALIFICATIONS OR PRIOR EDUCATION OF NATO TRAINEES, NICSMA RESPONDS, QUOTE BASIC QUALIFICATIONS OF NATO PERSONNEL WHICH WILL BE PROVIDED FOR TRAINING ARE DETAILED IN VOLUME I, PARA 5.3.4.8.1 OF THE SPECIFICATION. THESE QUALIFICATIONS ARE DEEMED REALISTIC IN CONSIDERING COURSE PARTICIPANTS AND ADEQUATE FOR THE BIDDER TO STRUCTURE AND COST HIS TRAINING PROGRAMS UNQUOTE.

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J. TO CONTRACTOR COMPLAINT THAT GENERAL TESTING PROVISIONS APPEAR TO REQUIRE CONTRACTOR TESTING TO MILITARY SPECIFICATION STANDARDS, CONTRARY TO INTENT SHOWN IN THE TECHNICAL SPECIFICATION AND DISCUSSED IN WORKING GROUP 18, NICSMA REPLIES: QUOTE

(I) NICSMA CONSIDERS THAT THE LEVEL OF TESTING SPECIFIED IS NECESSARY FOR A PROJECT OF THIS SCOPE. IN PARTICULAR, THE ENVIRONMENTAL TESTING SPECIFIED IN NGTS 40 IS REQUIRED TO ENSURE THAT THE EQUIPMENT CAN BE SUPPORTED IN ALL NATO COUNTRIES USING STANDARD MILITARY LOGISTICS PROCEDURES;

(II) QUALIFICATION TESTS, WHICH EMBODY ENVIRONMENTAL TESTS SHALL BE APPLIED IN ACCORDANCE WITH THE TARE IFB, VOLUME II, PART 4, SECTION 12, PARAGRAPHS 12.1.3., 12.1.4., 12.6.1.(1)., 12.7.1.7. THE TEST PROCEDURES TO BE APPLIED ARE DEFINED IN VOLUME II, PART 5 QUOTE APPLICABILITY OF THE NGTS TO NICSMA TARE/ MDC PROJECT UNQUOTE, PARAGRAPHS 3.0 AND 3.1, WHEREBY: -

(A) THE CONTRACTOR SHALL DEFINE TESTS TO DEMONSTRATE THAT THE TARE, ECE AND UPS EQUIPMENT FUNCTION CORRECTLY IN THEIR RESPECTIVE OPERATING ENVIRONMENTS;

(B) THE TESTS DEFINED IN NGTS 40, AS AMENDED BY PARAGRAPH 3.1. REFERRED TO ABOVE, WILL PROVE THAT THE EQUIPMENT UNCLASSIFIED

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CAN WITHSTAND THE ENVIRONMENTAL EXTREMES ENCOUNTERED DURING TRANSPORTATION, HANDLING AND STORAGE OF THE EQUIPMENT FOR LOGISTICS SUPPORT PURPOSES;

(III) THE ADAPTATION OF COMMERCIAL TESTING PROCEDURES WHICH, IN THEMSELVES, ARE NOT ESTABLISHED STANDARDS, WOULD REQUIRE A COSTLY AND TIME-CONSUMING EFFORT FOR BEYOND NICSMA'S CAPABILITIES. SINCE THE LEVEL OF APPLICATION WE HAVE DETAILED ABOVE IS ONLY THAT ADEQUATE TO ACHIEVING OUR ULTIMATE REQUIREMENT, SUCH AN EFFORT WOULD ONLY RESULT IN APPROXIMATELY EQUAL TESTING REQUIREMENTS UNQUOTE.

2. MISSION RAISED QUESTIONS WHICH ARE ANSWERED ABOVE ON THE BASIS OF COMPLAINTS RECEIVED FROM US CONTRACTORS HERE: BURROUGHS, LITTON AND IBM. LOCAL REPRESENTATIVES OF THESE FIRMS WILL BE REVIEWING ANSWERS HERE AS WELL AS IN CORPORATE HEADQUARTERS WHEN OFFICIAL NICSMA DOCUMENTS HAVE BEEN RECEIVED. WE INTEND TO PURSUE AT 16 JANUARY P&P COMMITTEE MEETING ANSWERS TO QUESTIONS D, G, H, AND J, WHICH APPEAR NOT TO SATISFY CONTRACTORS' CONCERNS.

3. BASIS FOR MISSION ACTIONS TO DATE HAS BEEN THE APPARENTLY NEEDLESS CLAUSES IN THE NICSMA TERMS AND CONDITIONS WHICH TENDED TO INCREASE COSTS OF THE TARE PROJECT. ONLY TWO SUCH COMPLAINTS HAVE BEEN RECEIVED CONCERNING THE TECHNICAL SPECIFICATIONS, BOTH FROM SAME US CONTRACTOR. COMPLAINTS CONCERNED NICSMA REQUIREMENT FOR 99.999 PCT (FIVE NINES) AND FOR RETRIEVAL OF LOST MESSAGES WITHOUT RETRANSMITTAL FROM ORIGINATOR. BOTH PROVISIONS WOULD REQUIRE ADDITIONAL FRONT-END PROCESSORS WHICH, WHILE ADDING SLIGHTLY TO THE COST, DO NOT APPEAR TO PRESENT MAJOR DIFFICULTIES TO OTHER US CONTRACTORS. MISSION HAS NOT THEREFORE PURSUED THESE COMPLAINTS.

4. MISSION WILL CONTINUE TO MONITOR NICS PROCUREMENT ACTIONS IN EFFORT TO AVOID DISCRIMINATION AGAINST US FIRMS. CURRENT PROBLEM DOES NOT APPEAR, HOWEVER, TO HAVE TO DO WITH USE OF QUOTE EUROPEAN TYPE CONTRACT TERMS AND CONDITIONS UNQUOTE, BUT RATHER WITH NICSMA INTENTION TO PROTECT NATO BY ADOPTION OF THE MOST STRINGENT CONTRACT TERMS USED BY US, GERMANY, AND UK. DIFFICULTY STEMS FROM FACT THAT NATIONS UNDERSTAND THE APPLICATION OF NATIONAL TERMS, WHEREAS THEY DO NOT TRUST THE RELATIVELY UNCLASSIFIED

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INEXPERIENCED NICSMA NOT TO USE THE MORE STRINGENT OF SUCH
TERMS IN AN EFFORT TO SQUEEZE MORE OUT OF THE CONTRACTOR.BRUCE

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